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No. 01-363

In the Supreme Court of the United States

RICHARD E. BUSCH, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that service of process was effected in this case under Rule 4(e)(2) of the Federal Rules of Civil Procedure, when a copy of the summons and complaint was delivered to petitioner's lawful agent.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 12-14) and of the district court (Pet. App. 15-28) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2001. A petition for rehearing was denied on May 30, 2001 (Pet. App. 10-11). The petition for a writ of certiorari was filed on August 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a foreign trader who participated in a scheme to defraud United States citizens. Pet. App. 20, 26; see 17 C.F.R. 15.00(a)(2)(e).* In July 1998, the Commodity Futures Trading Commission (Commission) filed a complaint against petitioner and others for violations of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and regulations thereunder. In February 1999, the Commission moved for entry of a default judgment against petitioner. The Commission explained that it had served petitioner in two different ways. First, the Commission delivered a copy of the summons and complaint to the Chicago offices of Alaron Trading Corporation (Alaron), petitioner's domestic agent under the foreign trader regulations (17 C.F.R. 15.05(b)), effecting service pursuant to Fed. R. Civ. P. 4(e)(2). Second, the Commission served petitioner himself in Panama City, on January 9, 1999, effecting service pursuant to Rule 4(f)(3). Pet. App. 14, 16.

On March 5, 1999 the district court granted the Commission's motion and entered a default judgment against petitioner. The court further ordered petitioner to make full restitution to victims of his financial fraud within thirty days, finding:

> [Petitioner] has misappropriated investor funds and has omitted to inform investors that their funds would be deposited in non-Fund controlled accounts. As a result, [petitioner] has illegally solicited at least fourteen (14) Alabama residents to invest a

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* A "foreign trader" is a trader who is domiciled or resides outside of the United States and is "a person who, for his own account or for an account which he controls, makes transactions in commodity futures or options, or has such transactions made." 17 C.F.R. 15.00(a)(2)(e).

total of at least $10,849,000 in the Fund in amounts ranging from $190,000 to $2,220,000.

I C.A. Rec. 2. Pursuant to 7 U.S.C. 13a-1(d)(1), petitioner was assessed a civil monetary penalty of $32,547,000, representing triple the monetary gain that he received as a result of his violations of the CEA and the Commission's regulations. Pet. App. 18.

Petitioner did not comply with that order and, on April 16, 1999, the court ordered him to appear and show cause why he should not be held in contempt. Counsel for petitioner appeared and contested the sufficiency of service of process upon petitioner. In particular, counsel argued that petitioner was not in Panama City on January 9, 1999, and that he had not been served personally with the summons or complaint. Following an evidentiary hearing, the district court rejected that argument and found that petitioner had been properly served. The district court gave petitioner until June 21, 1999, to comply with the court's judgment or face issuance of an arrest warrant for contempt. Pet. App. 18-19.

2. Petitioner then moved to vacate the default judgment, arguing that the service of process was insufficient and that he lacked sufficient contacts with the United States to establish personal jurisdiction. On March 14, 2000, after conducting a second evidentiary hearing, the district court denied petitioner's motion, concluding (again) that petitioner had been properly served and finding that he possessed "the requisite minimum contacts with the United States" to establish personal jurisdiction. Pet. App. 25; see *id.* at 15-28.

In particular, the district court found that on January 5, 1999, the Commission had delivered the summons and complaint to Alaron's Chicago offices; that "Alaron

was, for purposes of service, an agent of [petitioner]" under 17 C.F.R. 15.05(b); and that petitioner was therefore properly served pursuant to Fed. R. Civ. P. 4(e)(2). Pet. App. 20. The court rejected the argument that, as a matter of law, the Commission was required to prove that Alaron actually "transmitted notice of the suit to [petitioner]." *Ibid.* The court explained that that burden not only is not imposed by the foreign trader regulations or other law, but, if adopted, "would place the Commission at the mercy of the defendant's agent and would frustrate the Commission in the performance of its statutory duty to regulate the activities of persons such as [petitioner], and, in so doing, to protect the citizens of the United States from unscrupulous traders." *Id.* at 22. The court also noted that "[petitioner] does not actually deny that he received the summons and complaint from Alaron." *Id.* at 21 n.2.

The district court further found that petitioner was served in person with a copy of the summons and complaint in Panama City. Pet. App. 25. But the court did not rely on that service because it concluded that the Commission did not show that that service had been made in accordance with Panama law, as the court believed was required by Fed. R. Civ. P. 4(f). *Id.* at 23-25.

The district court gave petitioner "one last opportunity to comply with the terms of [its prior restitution order] before facing sanctions," and instructed petitioner to do so within fifteen days. Pet. App. 27-28. The court further ordered that if petitioner failed to certify compliance within that period, a warrant would be issued for his arrest. *Id.* at 28. Petitioner failed to comply with that order and, on April 4, 2000, the court issued a warrant for his arrest, which remains outstanding.

3. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 12-14. The court held that "the record clearly reflects that [petitioner] was served process in accordance with Rule 4(e)." *Id.* at 14. The court explained that "[u]nder 17 C.F.R. § 15.05, [Alaron] was a lawful agent of [petitioner], a 'foreign trader' under the regulations," and that "it is undisputed that [the Commission] served a copy of the summons and complaint upon Alaron." *Ibid.* The court rejected the argument that the regulations required the Commission "to ensure that Alaron fulfilled its legal obligation to forward the summons and complaint on to [petitioner]," explaining that "[n]othing in the case law or regulations themselves supports such a reading, nor do we think it makes sense to place a plaintiff at the mercy of a defendant's agent in the service of process upon a defendant." *Ibid.*

Because the court of appeals concluded that service was proper under Rule 4(e)(2), it did not "address whether [petitioner] was served in Panama in compliance with Fed. R. Civ. P. 4(f)(3)." Pet. App. 14 n.3. The court also did not reach the Commission's argument that, because he is a fugitive from justice, petitioner should not be permitted to press his appeal at all. *Id.* at 13 n.1; see *Ortega-Rodriguez* v. *United States*, 507 U.S. 234 (1993).

ARGUMENT

Petitioner renews (Pet. 1-7) his argument that service of process was insufficient. The courts below properly rejected that contention, and the unpublished decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 1) that 17 C.F.R. 15.05(b) imposes "a mandatory notice requirement" upon the Commission to establish not only that it served the lawful agent of a foreign trader, but also that that agent notified the trader of the suit. That is incorrect. The foreign trader regulation provides that "[s]ervice or delivery of any communication issued by or on behalf of the Commission to a futures commission merchant * * * shall constitute valid and effective service or delivery upon the * * * foreign trader." 17 C.F.R. 15.05(b). As the courts below concluded, under that provision "service is completed upon delivery of the summons and complaint to the futures merchant and not when they are subsequently transmitted to [the] foreign broker or trader." Pet. App. 22; see *id.* at 20.

To be sure, the regulation also directs the agent to "transmit the communication promptly and in a manner which is reasonable under the circumstances * * * to the * * * foreign trader." 17 C.F.R. 15.05(b). But the regulation in no way makes the effectiveness of service of process contingent upon the Commission's ability to prove that the agent complied with its independent duty to transmit notice to the foreign trader. Moreover, as the court of appeals explained, that interpretation not only is not supported by the regulation, but would place the Commission "at the mercy of the defendant's agent and would frustrate the Commission in the performance of its statutory duty to regulate the activities of persons such as [petitioner]." Pet. App. 20; see *id.* at 22. And such an interpretation would be especially unwarranted in this case, where the district court found that petitioner in fact received a copy of the summons and complaint, and thus plainly had notice of the action. *Id.* at 21 n.2l, 25.

That conclusion is consistent with the Federal Rules of Civil Procedure. Rule 4(e)(2) provides that service of process may be effected by delivering a copy of the summons and complaint to "an agent authorized by appointment or by law to receive service of process." Petitioner does not challenge the finding of the courts below that Alaron was a lawful agent of petitioner pursuant to the foreign trader regulations. Pet. App. 14, 20. Rule 4(e)(2) does not impose upon a plaintiff any burden of proving that the lawful service agent performed its agency obligations.

2. Nor is there any merit to petitioner's suggestion (Pet. 1) that failure to require the Commission to prove that the lawful agent gave petitioner notice of the complaint would raise due process concerns. In *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 707 (1988), this Court recognized that a foreign entity may be served through a lawful domestic agent, and that "the Due Process Clause does not require an official transmittal of documents abroad every time there is [domestic] service on a foreign national." Moreover, as discussed above, there can be no serious dispute that the Commission reasonably attempted to provide petitioner with notice of this action; it *personally* served him with the complaint in Panama City. Pet. App. 25. Nothing in *National Equipment Rental Limited* v. *Szukhent*, 375 U.S. 311 (1964), bolsters petitioner's due process argument. Indeed, no due process claim was made in that case because there, as here, the defendants in fact received notice of the suit against them. *Id.* at 315.

3. Finally, "[i]t has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez* v. *United*

States, 507 U.S. 234, 239 (1993). A criminal defendant who remains at large may forfeit his right to "call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam). Petitioner "is currently a fugitive," Pet. App. 13 n.1, and his fugitive status provides further reason to deny his request for review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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